

## SUBCHAPTER B—PAYMENT PROCEDURES

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AUTHORITY: 23 U.S.C. 101(e), 106(c), 109(e), 114(a), 120(g), 121(d), 122, 130, and 315; and 49 CFR 1.48(b).

#### Subpart A [Reserved]

#### Subpart B—Construction Engineering Costs

SOURCE: 58 FR 39143, July 22, 1993, unless otherwise noted.

##### § 140.201 Purpose.

The purpose of this subpart is to prescribe policies for claiming reimbursement for eligible construction engineering (CE) costs.

##### § 140.203 Policy.

(a) State highway agencies (SHA) may be reimbursed for the Federal

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share of CE costs incurred as described in § 140.703.

(b) Reimbursement for CE costs for Federal-aid construction projects shall be subject to the limitation set forth in § 140.205.

### § 140.205 Limitation.

(a) The estimated CE costs for a SHA for a fiscal year shall not exceed, in the aggregate, 15 percent of the total estimated costs of all projects financed within the boundaries of the State with Federal-aid highway funds in such fiscal year, exclusive of the costs of rights-of-way, preliminary engineering, and CE.

(b) For control purposes, a SHA's estimated CE costs percentage will be determined by the ratio of the total amount obligated for CE to the total amount obligated for all projects financed with Federal-aid highway funds during the fiscal year, after excluding from such totals, the obligations for rights-of-way, preliminary engineering, and CE. This percentage shall not exceed 15 percent at the end of the fiscal year. The CE limitation may be applied on either a Federal or State fiscal year basis.

(1) Amounts to be included in the determination for CE will be the aggregate total of all obligations of CE, including original project obligations at the authorization stage, all subsequent adjustments during the fiscal year, and all adjustments (debits or credits) to projects authorized in previous fiscal years.

(2) The CE limitation determination for each fiscal year will be treated separately and may not be adjusted after the end of that fiscal year.

(c) Projects which are closed (final voucher processed) as of December 18, 1991, may be reopened to accept adjustments and additional eligible project charges. All obligation/deobligation adjustments must be included in the current fiscal year calculation. However, the CE cost for each of these projects shall be limited to 15 percent of each project construction cost in accordance with the provisions in effect prior to December 18, 1991.

(d) If the SHA claims CE costs as an average percentage of the actual construction costs in accordance with 23

U.S.C. 120(g), the average rate shall be determined based upon reimbursable CE costs and shall not exceed 15 percent, exclusive of the costs of rights-of-way, preliminary engineering, and CE.

### § 140.207 Application of limitation.

The limitation applies to all projects financed with Federal-aid highway funds.

## Subpart C—Temporary Matching Fund Waiver

SOURCE: 58 FR 6714, Feb. 2, 1993, unless otherwise noted.

### § 140.301 Purpose.

The purpose of this regulation is to prescribe procedures for administering section 1054 of the Intermodal Surface Transportation Efficiency Act of 1991, providing for a temporary waiver of State matching fund requirements.

### § 140.303 Applicability.

The provisions of this subpart are applicable to qualifying projects as defined in § 140.305 during the period beginning October 1, 1991, and ending September 30, 1993.

### § 140.305 Definitions.

As used in this subpart:

*Governor* means the Governor of any one of the fifty States, or Puerto Rico, and includes the Mayor of the District of Columbia.

*Increased Federal share* means the portion of the approved Federal share which is in excess of the regular Federal share that would have been approved if a matching fund waiver had not been requested.

*Qualifying project* means a project approved after December 18, 1991, under 23 U.S.C. 106(a), or a project for which the United States becomes obligated to pay after December 18, 1991, under 23 U.S.C. 117 or 23 U.S.C. 133(e), for which the Governor has submitted a certification described in § 140.307.

### § 140.307 Submission of certification by Governor.

The Governor of the State shall submit a certification in writing to the Federal Highway Administration

(FHWA) Division Administrator certifying that sufficient funds are not available to pay the cost of the non-Federal share of a qualifying project, taking into account all State and local funds that are available for obligation on Federal-aid highway projects. Funds encumbered or committed to other existing programs are considered unavailable for matching purposes.

**§ 140.309 Request and approval of increase in Federal share.**

(a) The State may submit a request in writing to the FHWA Division Administrator for an increase in the Federal share of a qualifying project up to and including 100 percent at the time the State submits a request for project approval or obligation. The request shall specify the Federal pro rata share, the amount of regular Federal funds and the amount of the increased Federal share desired.

(b) To maximize the obligation of Federal funds, the amount obligated for the increased Federal share may be based on the estimated costs to be incurred by the State before September 30, 1993, instead of the total estimated project costs.

(c) When submitting the project agreement, Form PR-2, pursuant to § 630.304 of this title, the State shall include in the agreement the following provision:

The Federal-aid participation is increased to \_\_\_\_\_ percent for reimbursement claims paid on or before September 30, 1993, in accordance with Pub. L. 102-240, section 1054. The additional Federal funds requested total \$ \_\_\_\_\_. Claims paid after September 30, 1993, shall be at the regular Federal pro rata share of \_\_\_\_\_ percent.

(d) The State may claim reimbursement for the increased Federal share as a part of its normal billing procedures. Participating costs incurred by the State on qualifying projects shall be charged on a pro rata basis to the regular Federal share, increased Federal share, and non-Federal share, if any.

**§ 140.311 Repayment of the increased Federal share.**

(a) The State shall repay the amount of the increased Federal share made pursuant to this subpart on or before March 30, 1994. If such repayment is not

made by the State, the FHWA shall make the deductions as provided in paragraph (c) of this section.

(b) The FHWA shall deposit all repayments made by a State under paragraph (a) of this section to the Highway Trust Fund and shall credit the repayments to the appropriate apportionment accounts of the State.

(c) If the total amount of the increased Federal share is not repaid on or before March 30, 1994, deductions shall be made from the State's fiscal year 1995 and fiscal year 1996 apportionments. The total amount deducted shall be the amount reimbursed to the State on the increased Federal share of all qualifying projects. In each of the fiscal years, one-half of the total deduction shall be made from the following categories on a pro rata basis: National Highway System, Surface Transportation Program, Interstate Construction, Interstate Substitute, Interstate Maintenance Program, Bridge Program, and Congestion Mitigation and Air Quality Improvement Program.

(d) The total amount deducted in accordance with paragraph (c) of this section shall be reapportioned to those States which did not receive an increased Federal share under this subpart and to those States which have made repayment under this section. These reapportioned funds shall be credited to the same categories of funds on which the deductions occurred.

**Subpart D [Reserved]**

**Subpart E—Administrative Settlement Costs—Contract Claims**

SOURCE: 44 FR 59233, Oct. 15, 1979, unless otherwise noted.

**§ 140.501 Purpose.**

This regulation establishes the criteria for eligibility for reimbursement of administrative settlement costs in defense of contract claims on projects performed by a State under Federal-aid procedures.

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### § 140.503 Definition.

Administrative settlement costs are costs related to the defense and settlement of contract claims including, but not limited to, salaries of a contracting officer or his/her authorized representative, attorneys, and/or members of State boards of arbitration, appeals boards, or similar tribunals, which are allocable to the findings and determinations of contract claims, but not including administrative or overhead costs.

### § 140.505 Reimbursable costs.

(a) Federal funds may participate in administrative settlement costs which are:

- (1) Incurred after notice of claim,
  - (2) Properly supported,
  - (3) Directly allocable to a specific Federal-aid or Federal project,
  - (4) For employment of special counsel for review and defense of contract claims, when
    - (i) Recommended by the State Attorney General or State Highway Agency (SHA) legal counsel and
    - (ii) Approved in advance by the FHWA Division Administrator, with advice of FHWA Regional Counsel, and
  - (5) For travel and transportation expenses, if in accord with established policy and practices.
- (b) No reimbursement shall be made if it is determined by FHWA that there was negligence or wrongdoing of any kind by SHA officials with respect to the claim.

### Subpart F—Reimbursement for Bond Issue Projects

SOURCE: 48 FR 54971, Dec. 8, 1983, unless otherwise noted.

### § 140.601 Purpose.

To prescribe policies and procedures for the use of Federal funds by State highway agencies (SHAs) to aid in the retirement of the principal and interest of bonds, pursuant to 23 U.S.C. 122 and the payment of interest on bonds of eligible Interstate projects.

### § 140.602 Requirements and conditions.

(a) An SHA that uses the proceeds of bonds issued by the State, a county, city or other political subdivision of the State, for the construction of projects on the Federal-aid primary or Interstate system, or extensions of any of the Federal-aid highway systems in urban areas, or for substitute highway projects approved under 23 U.S.C. 103(e)(4), may claim payment of any portion of such sums apportioned to it for expenditures on such system to aid in the retirement of the principal of bonds at their maturities, to the extent that the proceeds of bonds have actually been expended in the construction of projects.

(b) Any interest earned and payable on bonds, the proceeds of which were expended on Interstate projects after November 6, 1978, is an eligible cost of construction. The amount of interest eligible for participation will be based on (1) the date the proceeds were expended on the project, (2) amount expended, and (3) the date of conversion to a regularly funded project. As provided for in section 115(c), Pub. L. 95-599, November 6, 1978, interest on bonds issued in any fiscal year by a State after November 6, 1978, may be paid under the authority of 23 U.S.C. 122 only if such SHA was eligible to obligate Interstate Discretionary funds under the provisions of 23 U.S.C. 118(b) during such fiscal year, and the Administrator certifies that such eligible SHA has utilized, or will utilize to the fullest extent possible during such fiscal year, its authority to obligate funds under 23 U.S.C. 118(b).

(c) The Federal share payable at the time of conversion, as provided for in § 140.610 shall be the legal pro rata in effect at the time of execution of the project agreement for the bond issue project.

(d) The authorization of a bond issue project does not constitute a commitment of Federal funds until the project is converted to a regular Federal-aid project as provided for in § 140.610.

(e) Reimbursements for the redemption of bonds may not precede, by more than 60 days, the scheduled date of the retirement of the bonds.

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(f) Federal funds are not eligible for payment into sinking funds created and maintained for the subsequent retirement of bonds.

### **§ 140.603 Programs.**

Programs covering projects to be financed from the proceeds of bonds shall be prepared and submitted to FHWA. Project designations shall be the same as for regular Federal-aid projects except that the prefix letter "B" for bond issue shall be used as the first letter of each project designation, e.g., "BI" for Bond Issue Projects—Interstate.

### **§ 140.604 Reimbursable schedule.**

Projects to be financed from other than Interstate funds shall be subject to a 36-month reimbursable schedule upon conversion to regular Federal-aid financing (See appendix). FHWA will consider requests for waiver of this provision at the time of conversion action. Waivers are subject to the availability of liquidating cash.

### **§ 140.605 Approval actions.**

(a) Authorization to proceed with preliminary engineering and acquisition of rights-of-way shall be issued in the same manner as for regularly financed Federal-aid projects.

(b) Authorization of physical construction shall be given in the same manner as for regularly financed Federal-aid projects. The total cost and Federal funds required, including interest, shall be indicated in the plans, specifications, and estimates.

(c) Projects subject to the reimbursable schedule shall be identified as an "E" project when the SHA is authorized to proceed with all or any phase of the work.

(d) Concurrence in the award of contracts shall be given.

### **§ 140.606 Project agreements.**

Project Agreements, Form PR-2, shall be prepared and executed. Agreement provision 8 on the reverse side of Form PR-2<sup>1</sup> shall apply for bond issue projects.

<sup>1</sup>The text of FHWA Form PR-2 is found in 23 CFR part 630, subpart C, appendix A.

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### **§ 140.607 Construction.**

Construction shall be supervised by the SHA in the same manner as for regularly financed Federal-aid projects. The FHWA will make construction inspections and reports.

### **§ 140.608 Reimbursable bond interest costs of Interstate projects.**

(a) Bond interest earned on bonds actually retired may be reimbursed on the Federal pro rata basis applicable to such projects in accordance with § 140.602(b) and (c).

(b) No interest will be reimbursed for bonds issued after November 6, 1978, used to retire or otherwise refinance bonds issued prior to that date.

### **§ 140.609 Progress and final vouchers.**

(a) Progress vouchers may be submitted for the Federal share of bonds retired or about to be retired, including eligible interest on Interstate Bond Issue Projects, the proceeds of which have actually been expended for the construction of the project.

(b) Upon completion of a bond issue project, a final voucher shall be submitted by the SHA. After final review, the SHA will be advised as to the total cost and Federal fund participation for the project.

### **§ 140.610 Conversion from bond issue to funded project status.**

(a) At such time as the SHA elects to apply available apportioned Federal-aid funds to the retirement of bonds, including eligible interest earned and payable on Interstate Bond Projects, subject to available obligational authority, its claim shall be supported by appropriate certifications as follows:

I hereby certify that the following bonds, (list), the proceeds of which have been actually expended in the construction of bond issue projects authorized by title 23 U.S.C., section 122, (1) have been retired on ———, or (2) mature and are scheduled for retirement on ———, which is ——— days in advance of the maturity date of ———.

Eligible interest claimed on Interstate Bond Projects shall be shown for each bond and the certification shall include the statement:

I also certify that interest earned and paid or payable for each bond listed has been determined from the date on and after which

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the respective bond proceeds were actually expended on the project.

(b) The SHA's request for full conversion of a completed projects), or partial conversion of an active or completed project(s), may be made by letter, inclusive of the appropriate certification as described in §140.610(a) making reference to any progress payments received or the final voucher(s) previously submitted and approved in accordance with §140.609.

(c) Approval of the conversion action shall be by the Division Administrator.

(d) The SHA's request for partial conversion of an active or completed bond issue project shall provide for: (1) Conversion to funded project status of the portion to be financed out of the balance of currently available apportioned funds, and (2) retention of the unfunded portion of the project in the bond program.

(e) Where the SHA's request involves the partial conversion of a completed bond issue project, payment of the Federal funds made available under the conversion action shall be accomplished through use of Form PR-20, Voucher for Work Performed under Provisions of the Federal-aid and Federal Highway Acts, prepared in the division office and appropriately cross-referenced to the Bond Issue Project final voucher previously submitted and approved. The final voucher will be reduced by the amount of the approved reimbursement.

### § 140.611 Determination of bond retirement.

Division Administrators shall be responsible for the prompt review of the SHA's records to determine that bonds issued to finance the projects and for which reimbursement has been made, including eligible bond interest expense, have been retired pursuant to the State's certification required by §140.610(a), and that such action is documented in the project file.

### § 140.612 Cash management.

By July 1 of each year the SHA will provide FHWA with a schedule, including the anticipated claims for reimbursement, of bond projects to be converted during the next two fiscal years. The data will be used by FHWA in de-

termining liquidating cash required to finance such conversions.

### APPENDIX TO SUBPART F—REIMBURSABLE SCHEDULE FOR CONVERTED "E" (BOND ISSUE) PROJECTS (OTHER THAN INTERSTATE PROJECTS)

Time in months following conversion from "E" (bond issue) project to regular project	Cumulative amount reimbursable (percent of Federal funds obligated)
1 .....	1
2 .....	2
3 .....	5
4 .....	9
5 .....	13
6 .....	18
7 .....	23
8 .....	29
9 .....	34
10 .....	39
11 .....	44
12 .....	49
13 .....	54
14 .....	58
15 .....	61
16 .....	64
17 .....	67
18 .....	70
19 .....	73
20 .....	75
21 .....	77
22 .....	79
23 .....	81
24 .....	83
25 .....	85
26 .....	87
27 .....	89
28 .....	91
29 .....	93
30 .....	94
31 .....	95
32 .....	96
34 .....	97
35 .....	99
36 .....	100

### Subpart G—Payroll and Related Expense of Public Employees; General Administration and Other Overhead; and Cost Accumulation Centers and Distribution Methods

SOURCE: 46 FR 3501, Jan. 15, 1981, unless otherwise noted.

### § 140.701 Purpose.

To prescribe policies and procedures for reimbursing a State highway agency (SHA) for the costs of salaries, wages, and related costs incurred by its employees or by those of a county, city, or other local public agency

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(LPA) for the benefit of a federally participating highway project.

#### § 140.703 Reimbursable costs.

The costs of salaries, wages, and related costs may be reimbursable for the following activities:

(a) *Preliminary engineering.* Location, design, and related work preparatory to the advancement of a project to physical construction.

(b) *Construction engineering.* The supervision and inspection of construction activities; additional staking functions considered necessary for effective control of the construction operations; testing materials incorporated into construction; checking shop drawings; and measurements needed for the preparation of pay estimates.

(c) *Acquisition of rights-of-way.* The preparation of right-of-way plans; making economic studies and other related preliminary work; appraisal for parcel acquisition; review of appraisals; preparation for and trial of condemnation cases; management of properties acquired; furnishing of relocation advisory assistance; and other related labor expenses.

(d) *Highway planning.* The orderly and continuing assembly and analysis of information about highways, such as the history of development and their extent, dimensions and conditions, use, economic and social effects, costs, and future needs.

(e) *Research and development.* The search for more complete knowledge of the characteristics of the highway system and the translation of the results of research into practice.

(f) *Administrative settlement costs-contract claims.* Services related to the review and defense of claims against Federal-aid projects, as provided for in subpart E of part 140 of this title, Administrative Settlement Costs-Contract Claims.

(g) *Miscellaneous functions.* Costs incurred for other activities which are properly attributable to, and for the benefit of, Federal-aid projects but are not assignable to any of the previously defined functions.

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#### § 140.705 Salaries and wages.

(a) Subject to appropriate authorization requirements, Federal funds may participate in the cost of salaries, wages, and related payroll expenses incurred for periods of time public employees are actively engaged, either directly or indirectly, in project-related activities.

(b) Salaries, wages, and related payroll expenses of an SHA for maintenance, general administration, supervision and other overhead are not eligible for reimbursement except as provided for in paragraph (b) of § 140.713.

#### § 140.707 Travel and transportation.

(a) Federal funds may participate in the cost of commercial transportation, privately owned automobiles, and per diem or subsistence which is essential to the prosecution of the project and is performed in accordance with prescribed procedures.

(b) Reimbursement may be made for use of privately owned automobiles and per diem or subsistence which is incurred in conformance with established reimbursement policy of the SHA or LPA.

#### § 140.709 Employee leave and holidays.

(a) An SHA or LPA may claim reimbursement for the costs of leave, i.e., annual, sick, military, jury, etc., that is earned, accounted for, and used in accordance with established procedures. The cost of such leave must be a liability of the SHA or LPA, must be equitably distributed to all activities, and the pro rata costs distributed to a Federal-aid project must be representative of the amount that is earned and accrued while working on the project.

(b) Compensatory leave granted by an SHA or LPA in lieu of payment of overtime to eligible employees may be claimed for reimbursement if accrued and granted under established policies on a uniform basis. Such leave costs must meet the criteria discussed in paragraph (a) of this section.

(c) Costs for other leave of a similar nature which may be peculiar to a specific SHA or LPA may also be reimbursed provided it meets the criteria set forth in paragraph (a) of this section.

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### § 140.711 Social security, retirement, and other payroll benefits.

(a) Federal funds may participate in allocable costs incurred for social security, retirement, group insurance premiums, and similar items applicable to salaries and wages of public employees engaged in work in Federal-aid projects.

(b) The costs for such benefits must be a liability of the SHA or LPA and must meet the criteria set forth in paragraph (a) of § 140.709.

### § 140.713 General administration and other overhead.

(a) General administration, supervision, and other unallowable overhead costs of an SHA are those considered necessary for the management, supervision, and administrative control of a suitably equipped, staffed and operational SHA. Examples of such unallowable costs may include, but are not limited to, the following types of personnel, related payroll benefit costs, and other administrative or support services;

(1) Directors, department heads, legal, accounting, budgeting, personnel, and procurement units.

(2) Related clerical, secretarial, and other support services for officials and personnel listed in paragraph (a)(1) of this section.

(3) Management, supervision, and administrative overhead costs incurred by other units or departments of State, county, or city governmental organizations.

(b) Costs incurred for services rendered by employees generally classified as administrative may, however, be considered eligible for reimbursement for:

(1) A highway planning unit and a research and development unit, in the ratio of time spent on the participating portion of work in the unit to the total unit's working hours, and

(2) Other operating units if such employees are assigned for specific identifiable periods of time to perform project-related activities in the same manner as other operating personnel.

[46 FR 3501, Jan. 15, 1981, as amended at 49 FR 45578, Nov. 19, 1984]

### § 140.715 Use of cost accumulation centers and cost distribution methods.

(a) Cost accumulation centers, i.e., cost centers, cost pools, or other acceptable cost accumulation methods, may be used to capture related types of costs for later distribution to all projects or other benefitting activities for which work was performed during the accounting period. The accounting and cost distribution procedures must be in accordance with paragraph (b) of this section for types of costs incurred under the following general criteria:

(1) Salaries, wages and related payroll benefit costs may be incurred during a payroll accounting period which affects a number of projects and, therefore, may not be easily adaptable to charging directly to individual projects due to such factors as (i) incompatibility of time increments for individual projects, (ii) an inordinate amount of time or additional number of documents to provide separate project coding, or (iii) a documented reduction of overhead costs in the elimination of processing source and coding required, increased electronic data processing applications, and additional accounting requirements.

(2) Small items of costs may be incurred which affect several projects and would result in a disproportionate amount of time and number of documents for separate project accounting in relation to the amount of costs involved.

(3) Items of costs may otherwise be eligible for reimbursement but, due to their nature and the small amounts involved, they are not being claimed for reimbursement, since the additional overhead costs required for separate project coding and effective internal controls are not cost beneficial in relation to separate project reimbursable amounts.

(4) The items of costs must be directly attributable to and properly allocable to the projects to which they are distributed. They must not lose their identity, i.e., type, amount, purpose for which incurred, whether federally participating, input source, etc.

(b) The use of separate cost accumulation centers for comparably related types of costs is a prerequisite to the use of percentages, or other acceptable



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distribution methods, for cost distribution to benefitting projects or other activities. The accounting procedures and methods of distribution used must have prior concurrence of the Federal Highway Administration, be representative of average actual costs, and must assure that (1) costs are uniformly and equitably distributed to all projects and activities for which work was performed during the accounting period irrespective of source of funds, (2) provisions are established for an adequate segregation of costs and separate distribution methods for similarly related types of costs, (3) actual costs and liabilities are fully accounted for and controlled, and (4) that reviews are made periodically, and the rates or other distribution methods are adjusted at least once annually by any over or under-distributed accumulated costs from the cost accumulation center for the preceding accounting period.

(c) Percentages representative of average actual costs may be used to distribute leave, social security, and other payroll benefits. Such rates are based on prior cost experience adjusted by anticipated known factors which will affect overall costs during the current year, i.e., scheduled salary increases, changes anticipated in insurance premiums, etc.

### Subpart H—State Highway Agency Audit Expense

SOURCE: 49 FR 45578, Nov. 19, 1984, unless otherwise noted.

#### § 140.801 Purpose.

To establish the reimbursement criteria for Federal participation in project related audit expenses.

#### § 140.803 Policy.

Project related audits performed in accordance with generally accepted auditing standards (as modified by the Comptroller General of the United States) and applicable Federal laws and regulations are eligible for Federal participation. The State highway agency (SHA) may use other State, local public agency, and Federal audit organizations as well as licensed or cer-

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tified public accounting firms to augment its audit force.

#### § 140.805 Definitions.

(a) *Project related audits.* Audits which directly benefit Federal-aid highway projects. Audits performed in accordance with the requirements of 23 CFR part 12, audits of third party contract costs, and other audits providing assurance that a recipient has complied with FHWA regulations are all considered project related audits. Audits benefiting only nonfederal projects, those performed for SHA management use only, or those serving similar nonfederal purposes are not considered project related.

(b) *Third party contract costs.* Project related costs incurred by railroads, utilities, consultants, governmental instrumentalities, universities, nonprofit organizations, construction contractors (force account work), and organizations engaged in right-of-way studies, planning, research, or related activities where the terms of a proposal or contract (including lump sum) necessitate an audit. Construction contracts (except force account work) are not included in this group.

#### § 140.807 Reimbursable costs.

(a) Federal funds may be used to reimburse an SHA for the following types of project related audit costs:

(1) Salaries, wages, and related costs paid to public employees in accordance with subpart G of this part,

(2) Payments by the SHA to any Federal, State, or local public agency audit organization, and

(3) Payments by the SHA to licensed or certified public accounting firms.

(b) Audit costs incurred by an SHA shall be equitably distributed to all benefiting parties. The portion of these costs allocated to the Federal-Aid Highway Program which are not directly related to a specific project or projects shall be equitably distributed, as a minimum, to the major FHWA funding categories in that State.

### Subpart I—Reimbursement for Railroad Work

SOURCE: 40 FR 16057, Apr. 9, 1975, unless otherwise noted.

**§ 140.900 Purpose.**

The purpose of this subpart is to prescribe policies and procedures on reimbursement to the States for railroad work done on projects undertaken pursuant to the provisions of 23 CFR part 646, subpart B.

**§ 140.902 Applicability.**

This subpart, and all references hereinafter made to "projects," applies to Federal-aid projects involving railroad facilities, including projects for the elimination of hazards of railroad-highway crossings, and other projects which use railroad properties or which involve adjustments required by highway construction to either railroad facilities or facilities that are jointly owned or used by railroad and utility companies.

**§ 140.904 Reimbursement basis.**

(a) *General.* On projects involving the elimination of hazards of railroad-highway crossings, and on other projects where a railroad company is not obligated to move or to change its facilities at its own expense, reimbursement will be made for the costs incurred by the State in making changes to railroad facilities as required in connection with a Federal-aid highway project, in accordance with the provisions of this subpart.

(b) *Eligibility.* To be eligible, the costs must be:

(1) For work which is included in an approved statewide transportation improvement program.

(2) Incurred subsequent to the date of authorization by the Federal Highway Administration (FHWA),

(3) Incurred in accordance with the provisions of 23 CFR, part 646, subpart B, and

(4) Properly attributable to the project.

[40 FR 16057, Apr. 9, 1975, as amended at 53 FR 18276, May 23, 1988; 62 FR 45328, Aug. 27, 1997]

**§ 140.906 Labor costs.**

(a) *General.* (1) Salaries and wages, at actual or average rates, and related expenses paid by a company to individuals, for the time they are working on the project, are reimbursable when sup-

ported by adequate records. This shall include labor costs associated with preliminary engineering, construction engineering, right-of-way, and force account construction.

(2) Salaries and expenses paid to individuals who are normally part of the overhead organization of the company may be reimbursed for the time they are working directly on the project, such as for accounting and bill preparation, when supported by adequate records and when the work performed by such individuals is essential to the project and could not have been accomplished as economically by employees outside the overhead organization.

(3) Amounts paid to engineers, architects and others for services directly related to projects may be reimbursed.

(b) *Labor surcharges.* (1) Labor surcharges include worker compensation insurance, public liability and property damage insurance, and such fringe benefits as the company has established for the benefit of its employees. The cost of labor surcharges will be reimbursed at actual cost to the company or a company may, at its option, use an additive rate or other similar technique in lieu of actual costs provided that (i) the rate is based on historical cost data of the company, (ii) such rate is representative of actual costs incurred, (iii) the rate is adjusted at least annually taking into consideration known anticipated changes and correcting for any over or under applied costs for the preceding period, and (iv) the rate is approved by the SHA and FHWA.

(2) Where the company is a self-insurer there may be reimbursement:

(i) At experience rates properly developed from actual costs, not to exceed the rates of a regular insurance company for the class of employment covered, or

(ii) At the option of the company, a fixed rate of 8 percent of direct labor costs for worker compensation and public liability and property damage insurance together.

[40 FR 16057, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 56 FR 56578, Nov. 6, 1991]

**§ 140.907 Overhead and indirect construction costs.**

(a) A State may elect to reimburse the railroad company for its overhead and indirect construction costs.

(b) The FHWA will participate in these costs provided that:

(1) The costs are distributed to all applicable work orders and other functions on an equitable and uniform basis in accordance with generally accepted accounting principles;

(2) The costs included in the distribution are limited to costs actually incurred by the railroad;

(3) The costs are eligible in accordance with the Federal Acquisition Regulation (48 CFR), part 31, Contract Cost Principles and Procedures, relating to contracts with commercial organizations;

(4) The costs are considered reasonable;

(5) Records are readily available at a single location which adequately support the costs included in the distribution, the method used for distributing the costs, and the basis for determining additive rates;

(6) The rates are adjusted at least annually taking into consideration any overrecovery or underrecovery of costs; and

(7) The railroad maintains written procedures which assure proper control and distribution of the overhead and indirect construction costs.

[53 FR 18276, May 23, 1988]

**§ 140.908 Materials and supplies.**

(a) *Procurement.* Materials and supplies, if available, are to be furnished from company stock, except they may be obtained from other sources near the project site when available at less cost. Where not available from company stock, they may be purchased either under competitive bids or existing continuing contracts, under which the lowest available prices are developed. Minor quantities and proprietary products are excluded from these requirements. The company shall not be required to change its existing standards for materials used in permanent changes to its facilities.

(b) *Costs.* (1) Materials and supplies furnished from company stock shall be

billed at current stock price of such new or used material at time of issue.

(2) Materials and supplies not furnished from company stock shall be billed at actual costs to the company delivered to the point of entry on the railroad company's line nearest the source of procurement.

(3) A reasonable cost of plant inspection and testing may be included in the costs of materials and supplies where such expense has been incurred. The computation of actual costs of materials and supplies shall include the deduction of all offered discounts, rebates and allowances.

(c) *Materials recovered.* (1) Materials recovered from temporary use and accepted for reuse by the company shall be credited to the project at prices charged to the job, less a consideration for loss in service life at 10 percent for rails, angle bars, tie plates and metal turnout materials and 15 percent for all other materials. Materials recovered from the permanent facility of the company that are accepted by the company for return to stock shall be credited to the project at current stock prices of such used material.

(2) Materials recovered and not accepted for reuse by the company, if determined to have a net sale value, shall be sold by the State or railroad following an opportunity for State inspection and appropriate solicitation for bids, to the highest bidder; or if the company practices a system of periodic disposal by sale, credit to the project shall be at the going prices supported by the records of the company. Where applicable, credit for materials recovered from the permanent facility in length or quantities in excess of that being placed should be reduced to reflect any increased cost of railroad operation resulting from the adjustment.

(d) *Removal costs.* Federal participation in the costs of removing, salvaging, transporting, and handling recovered materials will be limited to the value of materials recovered, except where FHWA approves additional measures for restoration of affected areas as required by the physical construction or by reason of safety or aesthetics.

(e) *Handling costs.* The actual and direct costs of handling and loading out

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of materials and supplies at and from company stores or material yards and of unloading and handling of recovered materials accepted by the company at its stores or material yards, are reimbursable. At the option of the company, 5 percent of the amounts billed for the materials and supplies which are issued from company stores and material yards will be reimbursable in lieu of actual costs.

(f) *Credit losses.* On projects where a company actually suffers loss by application of credits, the company shall have the opportunity of submitting a detailed statement of such loss as a basis for further adjustment.

### § 140.910 Equipment.

(a) *Company owned equipment.* Cost of company-owned equipment may be reimbursed for the average or actual cost of operation, light and running repairs, and depreciation, or at industry rates representative of actual costs as agreed to by the railroad, SHA, and FHWA. Reimbursement for company-owned vehicles may be made at average or actual costs or at rates of recorded use per mile which are representative of actual costs and agreed to by the company, SHA, and FHWA.

(b) *Other equipment.* Where company owned equipment is not available, reimbursement will be limited to the amount of rental paid (1) to the lowest qualified bidder, (2) under existing continuing contracts at reasonable cost, or (3) as an exception, by negotiation where (b) (1) and (2) are impractical due to project location or schedule.

[40 FR 16057, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982]

### § 140.912 Transportation.

(a) *Employees.* The company's cost of necessary employee transportation and subsistence directly attributable to the project, which is consistent with overall policy of the company, is reimbursable.

(b) *Materials, supplies, and equipment.* The most economical movement of materials, supplies and equipment to the project and necessary return to storage, including the associated costs of loading and unloading equipment, is reimbursable. Transportation by a railroad company over its own lines in a

revenue train is reimbursable at average or actual costs, at rates which are representative of actual costs, or at rates which the company charges its customers for similar shipments provided the rate structure is documented and available to the public. These rates are to be agreed to by the company, SHA, and FHWA. No charge will be made for transportation by work train other than the operating expenses of the work train. When it is more practicable or more economical to move equipment on its own wheels, reimbursement may be made at average or actual costs or at rates which are representative of actual costs and are agreed to by the railroad, SHA, and FHWA.

[40 FR 16057, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982]

### § 140.914 Credits for improvements.

(a) Credit shall be made to the project for additions or improvements which provide for higher quality or increased service capability of the operating facility and which are provided solely for the benefit of the company.

(b) Where buildings and other depreciable structures of a company which are integral to operation of rail traffic must be replaced, credit shall be made to the project as set forth in 23 CFR 646.216(c)(2).

(c) No credit is required for additions or improvements which are:

(1) Necessitated by the requirements of the highway project.

(2) Replacements which, although not identical, are of equivalent standard.

(3) Replacements of devices or materials no longer regularly manufactured and the next highest grade or size is used.

(4) Required by governmental and appropriate regulatory commission requirements.

### § 140.916 Protection.

The cost of essential protective services which, in the opinion of a railroad company, are required to ensure safety to railroad operations during certain periods of the construction of a project, is reimbursable provided an item for such services is incorporated in the State-railroad agreement or in a work

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order issued by the State and approved by FHWA.

### **§ 140.918 Maintenance and extended construction.**

The cost of maintenance and extended construction is reimbursable to the extent provided for in 23 CFR 646.216(f)(4), and where included in the State-Railroad Agreement or otherwise approved by the State and FHWA.

### **§ 140.920 Lump sum payments.**

Where approved by FHWA, pursuant to 23 CFR 646.216(d)(3), reimbursement may be made as a lump sum payment, in lieu of actual costs.

### **§ 140.922 Billings.**

(a) After the executed State-Railroad Agreement has been approved by FHWA, the company may be reimbursed on progress billings of incurred costs. Costs for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings following approval of the executed State-Railroad Agreement or the written agreement under 23 CFR 646.218(c).

(b) The company shall provide one final and complete billing of all incurred costs, or of the agreed-to lump sum, within one year following completion of the reimbursable railroad work. Otherwise, previous payments to the company may be considered final, except as agreed to between the SHA and the railroad.

(c) All company cost records and accounts relating to the project are subject to audit by representatives of the State and/or the Federal Government for a period of three years from the date final payment has been received by the company.

(d) A railroad company must advise the State promptly of any outstanding obligation of the State's contractor for services furnished by the company such as protective services.

[40 FR 16057, Apr. 9, 1975, as amended at 40 FR 29712, July 15, 1975; 62 FR 45328, Aug. 27, 1997]

## **23 CFR Ch. I (4–1–00 Edition)**

## **PART 172—ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICE CONTRACTS**

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AUTHORITY: 23 U.S.C. 112(b), 114(a), 302, 315, and 402; 49 CFR 1.48(b) and 18; 48 CFR 12 and 31; 41 U.S.C. 253 and 259; and sec. 1060, Pub. L. 102-240, 105 Stat. 1914, 2003 (1991).

SOURCE: 56 FR 19802, Apr. 30, 1991, unless otherwise noted.

### **Subpart A—Procurement Procedures**

#### **§ 172.1 Purpose and applicability.**

(a) To prescribe policies and procedures for contracting to ensure that a qualified consultant is obtained through an equitable selection process, and that prescribed work is properly accomplished in a timely manner, at a reasonable cost.

(b) This regulation applies to all engineering and design related service contracts financed with Federal-aid highway funds. Agencies with approved Certification Acceptance Plans (CA), Secondary Road Plans (SRP) and/or Combined Road Plans (CRP) shall submit for the Federal Highway Administration's (FHWA) approval, procedures consistent with this regulation if they intend to utilize Federal-aid highway funds for any of the above contract types. The use of procedures codified in State statutes to select consultant firms is also acceptable. Other types of negotiated contracts should be administered under the requirements of the common grant management rule, 49 CFR 18.